IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0475

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES JOSEPH MAIN, JR.,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable E. Wayne Phillips, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

STATEMENT OF THE ISSUES

1. Did the district court err in denying Appellant's motion to suppress?

2. Did the district court err in denying Appellant's motion to dismiss for insufficient evidence?

3. Was Appellant denied effective assistance of counsel?

STATEMENT OF THE CASE

If ever a case demonstrated the fallibility of Montana's felony murder rule in attaining justice, it is this one. This is an appeal of a June 23, 2009, judgment and conviction of the Twelfth Judicial District Court, Hill County, entered after a jury trial, adjudging James Joseph Main, Jr. (Main) guilty of the offense of deliberate homicide (felony murder), Mont. Code Ann. § 45-5-102(1)(b), and sentencing him to sixty years at the Montana State Prison (MSP) with the possibility of parole.

By an information filed December 8, 2006, Main was initially charged with deliberate homicide under Mont. Code Ann. § 45-5-102(1)(a). (D.C. Doc. 4.) The information also alleged Main committed the offense because of the victim's race pursuant to § 45-5-222. (D.C. Doc. 4.) An amended information was filed December 22, 2006, adding a charge for felony murder pursuant to § 45-5-102(1)(b), and also alleging Main committed the offense based on the victim's race. (D.C. Doc. 26.) An arraignment hearing occurred this same day where Main

pled not guilty. (D.C. Doc. 28.) An Omnibus hearing was held April 10, 2007. (D.C. Doc. 50.)

On May 23, 2007, Main filed a motion to suppress all statements and evidence against him based on statements he made to Assistant Chief of Police George Tate (Tate). (D.C. Doc. 73.) A motions hearing was held July 30, 2007. (D.C. Doc. 101.) Pursuant to a discussion during this hearing, Main filed an amended motion to suppress including statements made to Officer Dan Waldron (Waldron) in the absence of Miranda warnings on August 8, 2007. (D.C. Doc. 105.) On November 19, 2007, the State filed a second amended information omitting the race allegations. (D.C. Doc. 116.) On December 6, 2007, the district court granted the motion to suppress with respect to Main's conversation with Waldron, but denied the remainder of the motion with respect to Main's statements to Tate. (D.C. Doc. 126, attached as Exhibit 1.)

Specifically, the court determined Main was precluded from relying on a suppressed statement to Waldron--that he wanted to call his lawyer--as the foundation for suppressing his statements to Tate:

> An interesting legal question presents itself with regard to the motion to suppress the three remaining statements (to Assistant Police Chief Tate). The Defendant moved to suppress Defendant's "statements made to Officer Waldron." Amended Motion. That motion was granted (see above). Now Defendant wants to use one of those suppressed statements as the foundation stone for suppression of the Assistant Police Chief Tate interview statements. Can Defendant cherry pick one or more statements and pretend they are not

> suppressed? This Court concludes as a matter of law that the Defendant cannot use statements that he successfully moved to suppress.

(D.C. Doc. 126 at 2.)

The district court went on to deny Main's motion to suppress his statements to Tate on additional grounds--rejecting Main's argument that he was illegally arrested, rejecting his argument that his waiver of rights was not voluntary, and rejecting his argument he invoked his right to counsel. (D.C. Doc. 126 at 6-10.)

On January 16, 2008, Great Falls attorney Ken Olson (Olson) took over representation of Main from the State Public Defender's Office. (D.C. 142.) On December 29, 2008, the State realized it did not have sufficient evidence to prove the first count of deliberate homicide so it voluntarily dismissed it, leaving felony murder as the only remaining charged offense. (D.C. Doc. 174, 178; Tr. at 1503.)

On January 7, 2009, Main wrote a letter to the judge regarding complaints he had about Olson's representation. A hearing was held January 15, 2009, where Main expressed some serious concerns and appeared worn-out with his counsel, but ultimately resigned to his continued representation. (D.C. Doc. 189; 1/15/09 Hearing Tr. at 6.) The matter proceeded to trial on February 2, 2009. During trial, Main sought to introduce evidence of a gang known as the Little Valley Locals which Melissa Snow (Missy) and Kim Norquay, Jr. (Norquay) belonged. (Tr. at 645-46.) The court disallowed the evidence on the basis of relevancy and an off-

the-record bench conference was held; however, it does not appear Olson made an offer of proof. (Tr. at 646-47.) A short while later, the State introduced a gruesome crime scene video which showed blood evidence, but not in any probative detail so as to assist the jury. Moreover, the video included a prejudicial scene showing the victim's genitals. Olson did not object the admission of the video. (Tr. at 668.) When the State sought to play the video to the jury, the court questioned the necessity for doing so, as it was cumulative and might confuse the jury. (Tr. at 709-13.) Olson agreed with the court's characterization of the video as cumulative, but did not specifically object until after the court had already determined to allow it to be played to the jury. (Tr. at 711-15.) The court noted the late objection and the video was played to the jury. (Tr. at 715-16.)

At the end of the State's case, Olson moved for a judgment of acquittal (motion to dismiss for insufficient evidence) on the basis that the State had not established a prima facie case of felony murder because there was no evidence Main committed the underlying offense of aggravated assault and could not be linked to the strangulation--the cause of death which all admissible evidence established. (Tr. at 1233-36.) The court denied the motion on the basis the jury should determine whether blunt force trauma caused the victim's death rather than ligature strangulation. (Tr. at 1237.)

On February 9, 2009, the jury returned a guilty verdict to the offense of deliberate homicide. (D.C. Doc. 277; Tr. at 1603-04.) A sentencing hearing was held May 18, 2009, where the court, after noting its "significant problems with th[e] [felony murder] rule," sentenced Main to sixty years at MSP with no parole restriction. (D.C. Doc. 288; Sent. Trans. at 151.) In issuing this sentence, the court noted that Norquay, who was also convicted for the deliberate homicide of the victim in this case, received a significant sentence and that it wished to sentence Main to a lesser sentence--presumably because it was convinced Norquay was the actual murderer. (D.C. 151.)

A final judgment and sentencing order issued June 23, 2009. (D.C. Doc. 293; attached as Exhibit 2.) While this judgment refers to the conviction as one for "Deliberate Homicide by Accountability," the record is clear that the conviction was for felony murder pursuant to Mont. Code Ann. § 45-5-102(1)(b). It is from this final judgment, conviction and sentence that Main appeals.

STATEMENT OF FACTS

Main, an intelligent, likable and well-respected Native American from the Fort Belknap Reservation, recently returned to Montana after working as a chemical dependency counselor in California and later as a tribal mediator in racially sensitive communities, in order to assist his ailing mother. (Tr. at 867.) Main was dedicated to helping others in these capacities as well as in the capacity

of a spiritual healer. (D. C. Doc. 285.) Indeed, Main had no previous felony convictions, no prior assault convictions and very little experience with law enforcement. (D.C. Doc. 285; Sent. Hr. Tr. at 70.) His family was also well-respected and his father, James Main, Sr., was a well-known tribal leader. Main's father died just before the trial began and, unfortunately, Main was not permitted to attend the funeral due to reservation extradition concerns. (D.C. Doc. 255.)

While different stories emerged as to what exactly happened on the evening of November 24, 2006, and the early morning hours of November 25, 2006, which resulted in the unfortunate death of Lloyd "Lucky" Kvelstad (Kvelstad), the evidence introduced at trial supported the following version of events. In the early evening hours of November 24, 2006, Missy, Billy The Boy, Kvelstad and Norquay were all visiting and drinking alcohol at Missy's house in Havre, Montana. (Tr. at 490-91.) Main was also there, but was not a common cohort of the people in attendance and was not a regular attendant to these get-togethers. Missy had severe problems with alcohol and was well-known by Havre law enforcement. (Trial Tr. at 312-13; 331, 389, 581, 790, 866.) In fact, just two weeks prior to this incident, she had been arrested for assaulting Kvelstad. (Tr. at 331, 591.)

At some point in the evening, Jason Skidmore (Skidmore) and Joseph Red Elk (Red Elk) showed up at Missy's residence and began drinking with everyone

in the kitchen. Red Elk, fifteen years old, was an acquaintance of Skidmore and Norquay, but had never before met Main. (Tr. at 485-496.) When everyone was sitting around the kitchen table, Main and Kvelstad got into a discussion about Native Americans and "pilgrims." (Tr. at 493-97, 585-87, 608.) A minor scuffle ensued between the two of them, including some evidence Main half-jokingly messed around with the victim by "choking him out" until he briefly blacked out. (Tr. at 496-97, 501-02, 609.) There was also evidence that Skidmore "choked out" Kvelstad. (Tr. at 495-502.) It is clear from the record the victim recovered from these minor incidents and that no loss of blood occurred. (Tr. at 523, 543.)

As Skidmore and Red Elk were preparing to leave the residence to go back to the motel where they had previously been drinking, Norquay took down his pants and mocked a sexual assault upon the victim. (Tr. at 505, 527, 550-51.) Missy later recalled seeing Norquay playing with a "hoody string" from his sweatshirt while they were all sitting around the kitchen table. (Tr. at 597-98.) It is clear Main had no contact with the hoody string. (Tr. at 611-12.) There is conflicting evidence as to whether Skidmore and Red Elk came back to the residence very early the next morning. (Tr. at 508, 550-51, 561, 568-69.) However, both Skidmore and Red Elk appeared to have shed some of their own blood on the clothing they were wearing that evening. (Tr. at 1150-56.)

Around this same time that everyone was sitting around Missy's kitchen table talking, Georgetta Oats was out drinking at a local bar with her husband Nathan Oats (Oats) and her mother Ivy Snow, Missy's cousin. (Tr. at 252-53.) After leaving the bar at closing time, they went to Missy's house, entered the kitchen through the alley door and noticed the unresponsive victim lying on the living room couch with his pants down around his ankles. (Tr. at 256-59.) Oats noticed blood, said the man was dead and told his wife to call 911. (Tr. at 258-60.) Main was not present in the living room or in the kitchen at this time, however, The Boy and Norquay were there drinking alcohol. (Tr. at 265, 270, 281-83, 303.) Main awoke from the commotion in the living room and came out from the back bedroom. (Tr. at 281-83; 290.) Indeed, both Oats and Missy admitted that Main was in the back bedroom at this time. (Tr. at 623.) Oats immediately assumed someone at the house had killed the man so he told everyone to stay at the house until the police arrived. (Tr. at 261-62.) Norquay told Oats that nothing was wrong with the victim and that he was alive. (Tr. at 263.) Norquay immediately fled the residence and Oats thought Main wanted to leave the house too so he physically held him down--assaulting him and injuring him. (Mtns. Hearing Tr. at 69, 87; Trial Tr. at 266-70, 286.)

Around this time, in the early morning hours of November 25, 2006, the Havre Police Department dispatcher received a 911 call reporting the possible

death of a male at Missy's residence. Havre Police Patrolman Jason Barkus (Barkus) and emergency responders were the first to arrive on the scene. (Tr. at 312-13.) Waldron, Havre Police Officer Larry Virts (Virts) and Sergeant William Wilkinson (Wilkinson) also responded to Missy's house, which was quite filthy and cold. (Tr. at 316, 331, 342, 376, 390, 417.) The officers were familiar with everyone but Main. (Tr. at 342, 378.) Main was sitting at the kitchen table when law enforcement arrived--he reported that he was injured from the assault with Oats and requested medical attention. (Tr. at 287-88, 315, 332.) The remaining people were also in the kitchen. (Tr. at 315-16.)

Wilkinson took charge and directed the other officers to transport those at the scene to the police station. Barkus transported Oats to the police station and interviewed him. (Tr. at 349, 380-81.) Oats was intoxicated and excitable. (Tr. at 317-18, 335.) He had blood on his jeans. (Tr. at 319-20.) He assumed he would be charged with assault against Main. (Tr. at 350.) Barkus also interviewed Georgetta and Ivy. (Tr. at 323.) Waldron transported and interviewed Main, and Virts transported Missy and The Boy who were also interviewed by law enforcement. (Tr. at 380-81.) The Boy, an alcoholic transient, was not very cooperative. (Tr. at 784-85.) It was suspected he knew more than he was telling. (Tr. at 381-82.) He was later called to testify during the trial, but provided little intelligible information. (Tr. at 546-47.)

Tate and Sergeant Gabe Matosich (Matosich), now Assistant Chief of Police when Tate retired in 2008, then arrived at the scene. (Tr. at 383-84, 661-62, 728, 778.) Matosich took over and even though he was the last officer to arrive on the scene, he began securing and processing the crime scene. (Tr. at 384, 390, 663.) Wilkinson supposedly took photographs of the scene which were never produced, but did not process the crime scene at all. (Tr. at 384.) There was blood in the kitchen, dining room, and living room. (Tr. at 348, 385, 664.) A majority of the blood belonged to Kvelstad. (Tr. at 1150-56.) There was a large amount of blood near the victim's head. (Tr. at 329-30, 386.) Shoe treadmarks were noticed on the victim's shirt, which were later identified as being consistent with Norquay's shoes; Main's shoes were excluded. (Tr. at 769, 919, 1109, 1119.) The victim was not wearing any underwear and Norquay was later found to have an extra pair of underwear on his person. (Tr. at 825, 1219, 1227.) As the lighting in the house was somewhat dim, no one initially noticed that the victim had a hoody string ligature around his neck. (Tr. at 344-46, 391-93, 663, 906.) Tracks in the snow outside the house were observed which appeared to show someone running and jumping over a fence. (Tr. at 353, 702-03.) Barkus and Matosich also found a piece of flesh or bodily tissue in the alley, which appeared fresh and free of debris. (Tr. at 355-66, 692.) The tissue, however, was never tested despite the defendant's request it be tested. (Tr. at 727, 732-33, 742, 752-53, 884.)

Barkus located Skidmore and Red Elk in the basement of Willy Jo Skidmore's residence and they were transported to the police station to be interviewed. (Tr. at 323-27; 509.) Skidmore recalled extremely inconsistent versions of what happened that evening. (Tr. at 511-527.) Tate interviewed Norquay and seized his hoody sweatshirt, which did not have its string and contained a pair of soiled underwear in the pocket. (Tr. at 825.) The right sleeve of the hoody contained the victim's DNA. (Tr. at 1150-56.) DNA from Skidmore and Norquay was identified on the ligature hoody string. (Tr. at 1169-70.) Main's DNA was not located on the ligature. (Tr. at 918-19.)

Norquay was evasive about his involvement with the crime and repeatedly deceived law enforcement. By example, he washed his shoes after fleeing Missy's residence, he lied about the hoody string belonging to him, he lied about how blood got on his shoes claiming it was from slaughtering cows in Fresno, and repeatedly changed his story, but always blamed Main. (Tr. at 848, 895-96, 919, 927, 1192-1200.) At trial, Norquay essentially refused to testify despite the district court's grant of immunity. When he did speak, he denied everything. (Tr. at 1174-89.) Norquay's shoes tested positive for the victim's blood and he was ultimately convicted for deliberate homicide in a separate trial conducted just before Main's trial. (Tr. at 896-97, 1068, 1210-11.) Many of Main's trial witnesses, including Makray Demontiney, Nathan Morsette, and Sheldon Flying, implicated Norquay as

the murderer. (Tr. at 1275-85, 1296-1303, 1308-18.) Indeed, Norquay admitted to Morsette he strangled the victim with a string and was plotting to get Main convicted for the murder. (Tr. at 1298.) Morsette testified further that Norquay was bragging about the murder. (Tr. at 1303.)

The sheriff/coroner arrived on the scene and pronounced the victim dead at 6:30 am. (Tr. at 394, 438.) The victim had blood on his bruised face. (Tr. at 417.) Kvelstad's body was transported to the Northern Montana Hospital refrigerator until it could be transported to the State crime lab in Missoula the next day. (Tr. at 420-21, 444.) The sheriff/coroner arrived on the scene and determined the time of death to be 12:30 am because rigor mortis had not yet set in, which usually occurs four to six hours after death, depending on the ambient room temperature. (Tr. at 415-18.) In issuing the death certificate, the sheriff/coroner relied on State Medical Examiner Walter Kemp's (Kemp) determination as to cause of death--homicidal violence, including blunt force injuries and probable ligature strangulation. (Tr. at 422-29.) He himself did not know the cause of death and admitted that injuries which appear serious may not actually cause a person's death. (Tr. at 431.)

Kemp, a forensic pathologist, performed an autopsy on the victim. (Tr. at 948, 954.) Kemp noted the hoody string ligature around the victim's neck which was so tight he had to cut it off. (Tr. at 961.) The ligature was knotted and had

two hairs captured in the knot--one long dark hair and a shorter lighter hair--neither of which could be traced to any specific individual. (Tr. at 887, 1148-49, 1246-48.) He also noted the victim's blunt force injuries, bruises and fractured ribs, which he admitted were not so serious as to cause the death of the victim. (Tr. at 991-993, 1001, 1018, 1021.) Specifically, Kemp testified to the following when questioned by Olson:

> OLSON: Okay. So, let me get this straight: If I understand your testimony correctly, and you were kind enough to allow me to interview you not too long back, I believe you told me and I believe you told the jury here today, that the injuries as troublesome as they may appear on Mr. Kvelstad's face and head, would not have caused him to die?
>
> KEMP: No. The injuries, although they are impressive, those by themselves would not have caused his death, no.
>
> OLSON: They are not life threatening injuries?
>
> KEMP: Not the abrasions, laceration of the forehead, bruising, the changes in the eyelids by themselves, no, those are not lethal.
>
> OLSON: They were all injuries from which, if other things hadn't happened to him, he likely would have recovered fully, correct?
>
> KEMP: From those?
>
> OLSON: Yes. Shown in the pictures.
>
> KEMP: Yes.

(Tr. at 1018.)

Kemp also testified that the victim had a very high blood alcohol content (BAC) of .24. (Tr. at 998.) Kemp speculated this high BAC, coupled with the

non-lethal blunt force injuries, could combine to cause sleep apnea and death. (Tr. at 1001-03, 1027-28.) While Kemp based this speculative testimony on some research studies he had reviewed, his opinion regarding this cause of death was admittedly not to a reasonable degree of medical certainty. (Tr. at 999-1004, 1025.) Despite this lack of certainty, Olson did not object to Kemp's testimony and the jury was permitted to infer the victim's blunt force injuries, when combined with his alcohol intoxication, caused his death. Kemp testified further that the ligature was tight enough to interfere with blood flow and would have caused the victim's death if he was alive at the time of the strangulation, however, Kemp could not determine whether or not he was alive at time of the strangulation. (Tr. at 1007, 1026.) Kemp's official determination as to the cause of death was homicidal violence, including blunt force head injuries and probable ligature strangulation. (Tr. at 1002-03.)

Main's expert, Dr. Thomas Linn Bennett, a Billings forensic pathologist, disagreed with Kemp's theory and testified to the requisite degree of medical certainty that the ligature strangulation was undoubtedly the cause of death. (Tr. at 1436, 1439, 1446-47.) Bennett characterized Kemp's blunt force trauma/alcohol combination as a misguided theory because it was really an explanation for death when no other causes can be ascertained. (Tr. at 1432-33.) Bennett agreed with

Kemp that the blunt force trauma injuries did not cause the victim's death. (Tr. at 1425, 1429-31.)

In the early morning hours of November 25, 2006, Waldron placed Main into custody and took him to the police station for questioning. (7/30/07 Mtns. Hearing Tr. at 7-8.) While waiting for Tate to arrive to interrogate Main, Waldron and Main discussed various topics. (Mtns Hearing Tr. at 11-12, 45.) Waldron denied interrogating Main and did not advise him of his Miranda rights but made clear an interrogation by Tate was imminent. (Tr. at 15, 31.) Waldron did not ask Main about his mental status or administer a breathalyzer but did note he appeared intoxicated. (Tr. at 22, 33.) During Waldron's questioning, Main repeatedly mentioned his lawyer and, in one instance, requested to call his lawyer which Waldron denied. (D.C. Doc. 126 at 4.) Specifically, the following exchange took place:

> MAIN: Would you let me make a phone call, it's local, it has to be local.
>
> WALDRON: Nope, who you gonna call at 2 in the morning?
>
> MAIN: Call my mother to call my lawyer.
>
> WALDRON: Call your mom, well you'll have a chance to contact your lawyer.

(D.C. Doc. 105.)

After Main's conversation with Waldron, Tate interrogated Main, who Tate admitted was in custody at this point. (Mtns. Hr. Tr. at 68, 91; Trial Tr. at 801, 892-93, 901.) Tate did advise Main of his Miranda rights but claimed he was not under arrest. (Mtns. Hr. Tr. at 67; Trial Tr. at 803.) Tate admitted Main appeared intoxicated with slurred speech and probably would not have been in a condition to operate a vehicle. (Mtns. Hr. Tr. at 63, 89; Trial Tr. at 801.) At one point, Main asked Tate if he was going to be arrested, because if he was, he would have to call his lawyer. (Mtns. Hr. Tr. at 74.) Main denied any involvement with the death of the victim and, at this point, Tate did not believe he had grounds to arrest Main. (Mtns. Hr. Tr. at 96.) He did, however, obtain a search warrant to seize Main's clothing and take swabs. (Mtns. Hr. Tr. at 71, 92; Trial Tr. at 806-07.) Pictures were also taken of his injuries, which included some right hand abrasions, swollen knuckles and a bruised rib cage--all of which could have resulted from his altercation with Oats. (Trial Tr. at 857-859.) Main was released at around 8:00 a.m. and was taken to the Budget Inn, along with Missy. (Tr. at 892-93, 901.) Tate would later admit law enforcement focused solely on Main as a suspect and Norquay did a good job of shifting the blame away from himself and pointing the finger at Main. (Tr. at 880, 894, 898.) Indeed, Norquay was not charged with deliberate homicide, or any other offense, until months after Main. (Tr. at 1218.)

Tate interviewed Main again at 5:35 p.m. the same day, after he was located at a local residence and brought in to the police station in handcuffs. (Mtns. Hr. Tr. at 96, 125-27.) Main was intoxicated again but at one point invoked his right to an attorney, which Tate honored. (Mtns. Hr. Tr. at 75-77.) At the end of this interview, Tate arrested Main based on statements made by Missy and Norquay. (Mtns. Hr. Tr. at 80-81, 97, 105.) Upon Main's request, Tate conducted a third interview of Main on November 26, 2006, in the early afternoon at the jail. (Mtns. Hr. Tr. at 98; Trial Tr. at 853, 892-93, 901.) Tate again advised Main of his Miranda rights. (Mtns. Hr. Tr. at 78-79.)

Tate also interviewed Missy, who gave inconsistent versions of the events of the night in question. (Tr. at 786.) Trial witnesses Gabe Cheatam and Valerie Gardipee testified regarding conversations they had with Missy. Specifically, they testified that she admitted to hiding evidence, kicking the victim, participating in the victim's murder, and told them Main was being charged with a crime he did not commit. (Tr. at 912-13, 1262-68, 1275-85, 1346, 1455.) Kvelstad's blood was later identified on Missy's left shoelace. (Tr. at 1150-56.) She told Cheatam that two fights occurred that night and the second fight involved herself and Norquay and resulted in the victim being killed with a hoody string. (Tr. at 1338-44.) Cheatam also testified she cleaned up the blood, that Norquay had sex with the

victim after the murder, that Norquay threatened her, and that Norquay was real pleased with himself and had a big smile on his face afterwards. (Tr. at 1345-49.)

Missy told DeMontiney that while Main and the victim scuffled earlier in the evening, the death was the result of Norquay's strangling him with a string. (Tr. at 1278.) She admitted to cleaning up the blood after Norquay threatened her. (Tr. at 1279.) She also told Demontiney that Norquay sexually assaulted the victim afterwards. (Tr. at 1280.) In fact, the day after the murder, she told Flying that Norquay had killed Kvelstad and Main was in her bedroom at the time of the murder. (Tr. at 1317-18.) Two other people also made statements to law enforcement implicating Missy's involvement. (Tr. at 1271.) She ultimately admitted at trial that she cleaned up blood in the kitchen but denied telling other trial witnesses she was responsible for Kvelstad's death. (Tr. at 592-622.)

Law enforcement went back to the scene on November 29, 2006, for some additional crime scene processing where additional blood evidence was observed and processed for the first time, including a bloody footprint and a large jacket with gloves in the pocket, one of which contained a large amount of blood. (Tr. at 461-78, 706, 723-26, 746, 1097.) The footprint was insufficient to be tested or matched to anyone. (Tr. at 1114.) Law enforcement did not investigate who owned the jacket and the bloody glove was never tested despite the defendant's request it be tested. (Tr. at 732-33, 746, 908, 924, 945.) There was no evidence,

however, connecting the jacket to Main. In fact, there was evidence another jacket at the crime scene belonged to Main--a green Assiniboine Cree jacket. (Tr. at 700, 924-25.) Law enforcement also found a hoody string fob underneath a kitchen chair which was later connected to Norquay's hoody string ligature. (Tr. at 721, 918.)

STANDARD OF REVIEW

The Court reviews *de novo* a denial of a motion to dismiss for insufficient evidence, also referred to as a motion for a directed verdict or a motion for acquittal. *State v. Kummerfeldt*, 2008 MT 333, ¶ 6, 346 Mont. 187, 194 P.3d 662; *State v. Marler*, 2008 MT 13, ¶ 20, 341 Mont. 120, 176 P.3d 1010; *State v. McWilliams*, 2008 MT 59, ¶¶ 36-37, 341 Mont. 517, 178 P.3d 121. This Court reviews for clear error a district court's denial of a motion to suppress evidence. *State v. Thomas*, 2008 MT 206, ¶ 9, 344 Mont. 150, 186 P.3d 864. With respect to allegations of ineffective assistance of counsel, this Court reviews such claims *de novo* as they present mixed questions of law and fact. *State v. Herman*, 2008 MT 187, ¶ 10, 343 Mont. 494, 188 P.3d 978.

SUMMARY OF ARGUMENT

Law enforcement targeted Main from the beginning of the investigation despite the lack of evidence implicating him in Kvelstad's death. While law enforcement's motive in doing so is not reflected in the record, it is evident Main

was wrongly convicted of felony murder. Even viewed in a light most favorable to the State, the evidence merely showed Main inflicted minor injuries on the victim earlier in the evening in a harmlessly drunk and completely separate incident from the strangulation which caused his death.

The evidence established Main was not even in the room at the time of the victim's death. And any testimony by Kemp linking the minor injuries to the victim's death via a speculative alcohol intoxication/apnea theory must be disregarded. For these reasons, the district court should have granted Main's motion to dismiss for insufficient evidence at the end of the State's case.

Compounding this error is the fact Main was convicted based on evidence unconstitutionally obtained. The court should have granted Main's pretrial motion to suppress as he made a clear request for counsel during his discussion with Waldron. Last, Main's right to a fair trial was prejudiced by major errors of his trial counsel. While the bulk of these errors will be addressed in a petition for post-conviction relief, Main has several record-based errors which are appropriate for direct appeal.

All of these reasons demand this Court's reversal of Main's conviction for felony murder.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING MAIN'S MOTION TO DISMISS FOR INSUFFICIENT EVIDENCE.

A. Applicable Law

A district court properly grants a motion to dismiss for insufficient evidence only when no evidence exists upon which a rational trier of fact could find the essential elements of a crime beyond a reasonable doubt, when viewing the evidence in a light most favorable to the prosecution. *Marler*, ¶ 20; *City of Billings v. Albert*, 2009 MT 63, ¶ 13, 349 Mont. 400, 203 P.3d 828.

Main was charged with felony murder under Mont. Code Ann. § 45-5-102(1)(b). Proof of felony murder can be accomplished by multiple means under the statute:

> A person commits the offense of deliberate homicide if . . . the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.

Mont. Code Ann. 45-5-102(1)(b).

With respect to the origination of the felony murder rule, this Court stated in *State v. Burkhart*, 2004 MT 372, ¶¶ 40-41, 325 Mont. 27, 103 P.3d 1037:

> The felony-murder doctrine comes to us through the common law making one who causes another's death during a felony responsible

for murder. The first formal statement of the doctrine is often said to be in Mansell & Herbert's Case. (See Note, Felony Murder as a First Degree Offense: An Anachronism Retained, 66 Yale L.J. 427, 428 n.15 (1957)). Herbert and a group of more than forty followers had gone to Sir Richard Mansfield's house under pretense of lawful authority to seize goods by force. One of Herbert's servants threw a stone at a person in the gateway which instead hit and killed an unarmed woman coming out of Mansfield's house. The question at trial was whether the accused was guilty of murder or manslaughter. The court assumed that the throwing of the stone was not a careless act but rather the servant who threw the stone intended at least to hit, if not kill, some person on Mansfield's side. The court thus held that if one deliberately performed an act of violence to third parties, and a person not intended dies, it was murder regardless of any mistake or misapplication. Mansell & Herbert's Case, 2 Dyer 128b; 73 Eng.Rep. 279 (KB, 1558).

After its early enunciation, the felony-murder doctrine went unchallenged because at that time practically all felonies were punishable by death. Note, Felony Murder as a First Degree Offense: An Anachronism Retained, 66 Yale L.J. 427, 428 n.15 (1957). It was, therefore, of no particular consequence whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony. Case law of the nineteenth century, however, reflects the efforts of the English courts to limit the doctrine by requiring the underlying felony involve violence or be the "natural and probable consequence of the defendant's conduct . . . ." 2 Wayne R. LaFave, Substantive Criminal Law, § 14.5 at 446-47 (2d ed. 2003). In the twentieth century, the felony-murder doctrine was rarely invoked in England and in 1957, abolished. Opponents of the doctrine pointed out that in later years, numerous offenses which were once regarded as gross misdemeanors or misdemeanors had been made felonies by statutory enactment, many of which were malum prohibitum rather than malum in se. These changes, it was argued, made the felony-murder rule too harsh. Prevezer, The English Homicide Act: A New Attempt to Revise the Law of Murder, 57 Colum.L.Rev. 624, 635 (1957).

It is a long-established rule in Montana that "for the felony-murder rule to apply, a causal connection between the felonious act and the death must be present." *Kills On Top v. State*, 2000 MT 340, ¶ 21, 303 Mont. 164, 15 P.3d 422 (enumerating the elements of felony murder as: (1) the commission of a felony; (2) death; and (3) a causal connection between the felony and the death); *see also*, *State v. Lester Kills on Top*, 241 Mont. 378, 387, 787 P.2d 336, 342 (1990); *State ex rel. Murphy v. McKinnon*, 171 Mont. 120, 127, 556 P.2d 906, 910 (1976). While there is no requirement that the death be "in furtherance" of the threshold crime, it must occur in the course of the enumerated felony. Indeed, the necessary causal connection requires the death to occur during the underlying felony or the flight thereafter. *Burkhart*, ¶ 48.

In *Murphy*, this Court noted "with approval" the following guidelines as to the applicability of the felony murder rule:

> For the felony-murder rule to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony; that the homicide be so closely connected with such other crime as to be within the res gestae thereof; or the natural or necessary result of the unlawful act; or that it be one of the causes.
> . . .
> Something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that there was such actual legal relation between the killing and the crime committed or attempted that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it.

Murphy, 171 Mont. at 126-27, 556 P.2d at 910 (quoting Wharton's Criminal Law and Procedure, vol. 1, § 252, at 543).

Likewise, in *State v. Weinberger*, 206 Mont. 110, 671 P.2d 567 (1983), the Court quoted with approval this statement of the Pennsylvania Supreme Court:

> The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. "It is necessary . . . to show that the conduct causing death was done in furtherance of the design to commit the felony. **Death must be a consequence of the felony . . . and not merely coincidence**."

Weinberger, 206 Mont. at 115, 671 P.2d at 569 (quoting *Commonwealth v. Redline*, 137 A.2d 472, 476 (Pa. 1958) (emphasis added).

This Court has said that in order to establish felony murder, the State must prove the death was "an outgrowth of the [predicate] felony itself and related to the [predicate felony] by an unbroken chain of causation." *State v. Sunday*, 187 Mont. 292, 307, 609 P.2d 1188, 1197 (1980). This Court has also relied on Mont. Code Ann. § 45-2-201, to articulate the "causal relationship" necessary to prove felony murder. *Weinberger*, 206 Mont. at 114-15, 671 P.2d at 569; *State v. Turner*, 265 Mont. 337, 348, 877 P.2d 978, 984-85 (1994). This statute provides that "[c]onduct is the cause of a result if . . . without the conduct the result would not have occurred." Mont. Code Ann. § 45-2-201(1)(a).

B. Argument

The charge of felony murder against Main was not supported by the evidence introduced by the State at trial; therefore, the district court erred by denying Main's motion to dismiss at the close of the State's case. First, the evidence did not establish Main committed the offense of aggravated assault. Both Kemp and Bennett testified that any blunt force injuries from the previous assault were not serious and did not cause the victim's death. Nor was any evidence introduced establishing any apprehension of serious bodily injury. *See* Mont. Code Ann. § 45-5-202(1) (requiring a defendant to cause "serious bodily injury" or the "apprehension of serious bodily injury or death in another" for the offense of aggravated assault). *Weinberger*, 206 Mont. at 114-15, 671 P.2d at 569 ("if the proof of the commission of the underlying felony fails, the purported offender is not guilty of felony-murder").

Just as in *Weinberger*, "[t]he evidence completely fails to establish an aggravated assault" was committed by Main. *Weinberger*, 206 Mont. at 129, 671 P.2d at 577. "Since the evidence is insufficient to establish the underlying felony of attempted aggravated assault, [Main's] purpose and knowledge may not be presumed as to the charge of felony-murder." *Weinberger*, 206 Mont. at 131, 671 P.2d at 578. Yet that is precisely what occurred in this case when the district court denied Main's motion to dismiss for insufficient evidence.

More importantly, even assuming the State did prove the elements of aggravated assault, it failed to prove the requisite causal connection between the assault and the victim's death. The alleged assault on the victim was really only a minor scuffle which took place hours earlier in a separate and distinct act from the subsequent strangulation. And while Kemp speculated that a combination of alcohol and blunt force trauma injuries might have caused the victim's death, such testimony was improper and should not have been allowed. *State v. Vernes*, 2006 MT 32, ¶¶ 15-19, 331 Mont. 129, 130 P.3d 169; *Butler v. Domin*, 2000 MT 312, ¶ 13, 302 Mont. 452, 15 P.3d 1189 (both holding that a medical opinion must be based on the "more likely than not standard" to be admissible). Kemp admitted his opinion regarding the blunt force trauma/alcohol intoxication cause of death did not meet the requisite degree of medical certainty. (Tr. at 999-1004.) As this improper conjecture was the only evidence presented by the State connecting in any way the victim's assault injuries to his death, Main's motion to dismiss for insufficient evidence should have been granted.

In addition, the State produced absolutely no credible evidence linking Main to the ligature strangulation--the act which both experts testified (to the requisite degree of medical certainty) could have resulted in the victim's death. Bennett testified it *was* the cause of death and Kemp testified it could have been if the victim was alive at the time of the strangulation. Any assault by Main which

occurred earlier in the evening was not sufficiently connected to the subsequent strangulation so as to establish the requisite causal connection. All of the evidence at trial showed the victim recovered from these earlier events. Simply put, the State did not prove Kvelstad's death was an outgrowth of any assault perpetrated by Main and/or related to the assault by an unbroken chain of causation.

Indeed, if the earlier scuffle between Main and the victim did not occur, Kvelstad still would have died from the ligature strangulation. All the State established at trial was that the victim died in the same house and on the same evening the previous alleged assault occurred--this coincidence is not sufficient proof to sustain a conviction for felony murder. *Weinberger*, 206 Mont. at 115, 671 P.2d at 569 ("[t]he mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. 'It is necessary . . . to show that the conduct causing death was done in furtherance of the design to commit the felony. Death must be a consequence of the felony . . . and not merely coincidence'") (citation omitted). As aptly stated by this Court in *Weinberger*:

> [I]n order for the felony-murder rule to apply, the State must prove that the underlying felony was the cause of [the victim's] death. [The defendant's] conduct can be the cause of [the victim's] death only if without [the defendant's] conduct the result would not have occurred. Section 45-2-201(a), MCA. Here again, the case against [the defendant] fails completely. . .
>
> We therefore conclude that the conviction of [the defendant] under the felony-murder rule for deliberate homicide cannot be sustained. We

> reverse the conviction of [the defendant] and remand the cause to the District Court with instructions to dismiss the charges . . .

Just as in *Weinberger*, the State's case against Main for the offense of aggravated assault was not supported by the evidence introduced by the State. The elements of aggravated assault were not established, and even if they were, the requisite causal connection was lacking. Main's conviction simply cannot stand. Accordingly, this Court should reverse the district court's denial of Main's motion to dismiss for insufficient evidence.

II. THE DISTRICT COURT ERRED WHEN IT DENIED MAIN'S MOTION TO SUPPRESS.

A. Applicable Law

The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution provide that people have the right not to incriminate themselves. *In re Z.M.*, 2007 MT 122, ¶ 39, 337 Mont. 278, 160 P.3d 490. The United States Supreme Court addressed the right against self-incrimination in the hallmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966). "The *Miranda* Court held that the prosecution may not use statements that stem from a custodial interrogation of a defendant unless the defendant is warned, prior to questioning, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an

attorney." *State v. Olson*, 2003 MT 61, ¶ 13, 314 Mont. 402, 66 P.3d 297 (citing *Miranda*, 384 U.S. at 444).

Simply put, Miranda warnings are required to be administered by law enforcement when an individual is subject to a custodial interrogation. *See State v. McKee*, 2006 MT 5, ¶ 28, 330 Mont. 249, 127 P.3d 445; *State v. Munson*, 2007 MT 222, ¶ 20, 339 Mont. 68, 169 P.3d 364. And while an individual in custody may not be entitled to Miranda warnings if law enforcement has no plan to conduct an interrogation, courts have held Miranda warnings are required when an interrogation is imminent or pending. *Miranda*, 384 U.S. at 473-474 ("if the individual indicates in any manner, at any time *prior to* or during questioning, that he wishes to remain silent, or if he states that he wants an attorney, the interrogation must cease") (emphasis added); *United States v. Cooper*, 85 F. Supp. 2d 1, 23 (D.D.C. 2000) ("[a] reading of cases from other jurisdictions, however, seems to indicate the Miranda right to counsel may be invoked in a non-custodial setting where it is known that the defendant will be subsequently interrogated"); *People v. Nguyen*, 132 Cal. App. 4th 350, 357 (Cal. App. 4th Dist. 2005) ("a suspect may invoke Miranda's protections if custodial interrogation is impending or imminent").

An individual may waive his or her Fifth Amendment rights only if the waiver is made voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at

444; *State v. Gittens*, 2008 MT 55, ¶ 14, 341 Mont. 450, 178 P.3d 91 (citations omitted). It is well-established a defendant may move to suppress an admission or confession on the ground it was not voluntarily given. Mont. Code Ann. § 46-13-301. The State has the burden to prove any waiver of the constitutional right against self-incrimination was voluntarily, knowingly, and intelligently made. *Gittens*, ¶ 14. Voluntariness depends upon the totality of the circumstances, including the defendant's age, experience, education level, the defendant's prior experience with the criminal justice system and police interrogation, whether the accused was advised of his Miranda rights, and whether the police used impermissible practices to extract incriminating statements from the defendant. *State v. Jones*, 2006 MT 209, ¶ 21, 333 Mont. 294, 142 P.3d 851 (citation omitted). Alcohol intoxication may be considered in assessing the voluntariness of a waiver under this test. *State v. Cassell*, 280 Mont. 397, 401, 932 P.2d 478, 480 (1996).

If a suspect effectively waives his right to counsel after receiving Miranda warnings, law enforcement officers are free to question the suspect. However, if a suspect requests counsel at any time during the interview, he cannot be subject to further questioning until a lawyer has been made available or until the suspect reinitiates conversation with law enforcement officers. *State v. Maestas*, 2006 MT 101, ¶ 13, 332 Mont. 140, 136 P.3d 514 (*citing State v. Spang*, 2002 MT 120, ¶¶ 20-21, 310 Mont. 52, 48 P.3d 727). The mere fact that a suspect may have

previously answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney. *Miranda*, 384 U.S. at 445.

If a reasonable police officer in the circumstances would understand the statement to be a request for an attorney, the questioning must cease; however, if a suspect makes a reference to an attorney that is ambiguous or equivocal, the cessation of questioning is not required. *State v. Scheffer*, 2010 MT 73, ¶ 26, 355 Mont. 523, 230 P.3d 462 (a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney"); *Maestas*, ¶¶ 14, 19 (citing *Spang*, ¶ 21); *State v. Blakney*, 185 Mont. 470, 477, 605 P.2d 1093, 1097 (1979) (when an individual asserts his right to counsel in the course of questioning by law enforcement, there can be no further questioning).

B. Argument

Main's unequivocal request for counsel during the Waldron interview tainted all subsequent questioning. Even his third interview with Tate should have been suppressed because Main initiated it only to clear up his previous statements to Tate which should have never taken place given Main's request for counsel. The district court correctly suppressed the Waldron interview, however, it erred in its determination that Main's request for counsel during this interview could not be

used as a basis to invalidate all subsequent prejudicial evidence obtained by Tate. In *Spang*, this Court held it is improper for law enforcement to conduct any further questioning of a suspect after he makes an unambiguous request for counsel. *Spang*, ¶ 21. This is no less true when a suspect makes the request before the actual interrogation begins or before Miranda rights are administered because a person may invoke his right to counsel at any time after being taken in to custody, so long as it is in the context of an imminent or pending custodial interrogation. *United States v. Kelsey*, 951 F.2d 1196, 1199 (10th Cir. 1991) (holding that a valid request for counsel need not be preceded by warnings where the suspect is in custody).

Main was in custody and made a clear and unambiguous request for counsel. Main not only requested an attorney, but specifically requested to make a phone call to arrange to speak with his attorney. Indeed, Waldron did not ask any clarifying questions and clearly perceived it to be a request for counsel when he responded to Main's request--"well, you'll have a chance to contact your lawyer." Moreover, with respect to a suspect's right to counsel in this context, this Court will give greater protection to an individual invoking this right than that guaranteed by the United States Constitution. *Scheffer*, ¶ 27.

Cessation of questioning by law enforcement was required in this case until Main was provided an attorney. Since Tate continued to question Main after his

request for counsel, all statements he made and all evidence obtained should have been suppressed as "fruit of the poisonous tree" pursuant to *Wong Sun v. U.S.*, 371 U.S. 471, 485-86 (1963). This is true regardless of the fact Main may have subsequently waived his Miranda rights when advised by Tate because Tate initiated the questioning. Neither Tate nor Waldron could question Main until an attorney was provided.

And even if Main's subsequent waiver of rights could revive law enforcement's right to question him, this waiver was not voluntarily given due to his obvious alcohol intoxication and was therefore not effective. Tate admitted that Main appeared intoxicated with slurred speech and probably would not have been in a condition to operate a vehicle. (Mtns. Hr. Tr. at 63, 89; Trial Tr. at 801.) Indeed, Main passed out in the interview room. Other courts have held that alcohol intoxication may invalidate a Miranda waiver. *See United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998); *United States v. Korn*, 138 F.3d 1239, 1240 (8th Cir. 1998); *United States v. Byrne*, 83 F.3d 984, 989 (8th Cir. 1996); *United States v. Bonner*, 2010 U.S. Dist. LEXIS 38586 (M.D. Pa. Apr. 20, 2010) (finding defendant's Miranda warning not voluntary and invalidating waiver due, in part, to his state of intoxication). Had law enforcement chosen to administer a breathalyzer test to Main, the severity of his intoxication would have been established. Because no record of his BAC exists, the State failed to meet its

burden in proving that Main's waiver of the constitutional right against self-incrimination was voluntarily, knowingly, and intelligently made. *Gittens*, ¶ 14. As such, the waiver is void and Main's statements to Tate should have been suppressed.

Last, the district court's determination that Main could not "cherry pick" his statements made to Waldron and that a suppressed statement cannot also be an effective request for counsel is wholly misplaced and finds no support in the law. It would essentially eviscerate the "fruit of the poisonous tree" doctrine in this context. Indeed, there is no doubt had Main uttered any spontaneous incriminating statements to law enforcement, those statements would be used against him. The fact he requested counsel during his exchange with Waldron, even if that exchange was suppressed, can operate to void a subsequent interrogation. The district court's contrary conclusion was in error.

III. MAIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. Applicable Law

A defendant's right to effective assistance of counsel exists in order to give true meaning to the right to a fair trial. *City of Billings v. Smith*, 281 Mont. 133, 136, 932 P.2d 1058, 1060 (1997). The right to effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. The right to counsel is fundamental and

applies with equal force to all persons, regardless of their ability to compensate an attorney. *State v. Enright*, 233 Mont. 225, 228, 758 P.2d 779, 781 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution; and (2) counsel's failure is prejudicial. *State v. Rose*, 1998 MT 342, ¶ 12, 292 Mont. 350, 972 P.2d 321; *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, to prevail on such a claim, a defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d. 746 (citing *Hans v. State*, 283 Mont. 379, 391-93, 942 P.2d 674, 681-82 (1997)).

> To show prejudice, a defendant must show that, but for his counsel's unprofessional errors, there was reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial. *Soraich v. State*, 2002 MT 187, ¶ 15, 311 Mont. 90, 53 P.3d 878. This burden represents a fairly low threshold. *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005). "A 'reasonable probability' is less than a preponderance: '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 694).

Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *State v. Earl*, 2003 MT 158, ¶ 39, 316 Mont. 263, 71

P.3d 1201. A defendant may raise only record-based ineffective assistance claims on direct appeal. *Earl*, ¶ 39. This Court distinguishes record-based from non-record-based actions based on whether the record fully explains why counsel took, or failed to take, a particular course of action in providing a defense. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. A claimant must raise a claim of ineffective assistance of counsel in a petition for postconviction relief if the allegation cannot be documented from the record. *Earl*, ¶ 39.

A direct appeal, however, is the proper forum for determining ineffective assistance of counsel when an appellant asserts claims on record-based actions, untaken obligatory actions, or implausible actions. *State v. Roedel*, 2007 MT 291, ¶¶ 38, 46, 339 Mont. 489, 171 P.3d 694 (reviewing trial counsel's failure to object to expert's testimony). Claims of ineffective assistance of counsel based on counsel's conduct for which "no plausible justification" exists are considered record-based claims. *State v. Kougl*, 2004 MT 243, ¶ 19, 323 Mont. 6, 97 P.3d 1095 (trial counsel ineffective in failing to request an accomplice jury instruction); *Hagen v. State*, 1999 MT 8, ¶¶ 19-20, 293 Mont. 60, 973 P.2d 233 (claim that trial counsel was ineffective in failing to object to the State's introduction of medical reports, as well as other trial claims, should have been raised on direct appeal); *Petition of Hans*, 1998 MT 7, ¶¶ 28, 42, 288 Mont. 168, 175, 178, 958 P.2d 1175) (a claim of ineffective assistance predicated upon trial counsel's failure to object to

matters during trial "can be decided on the basis of the record" and should have been raised on direct appeal). Accordingly, Main asserts the following record-based ineffective assistance of counsel claims.

B. Argument

Main's trial counsel did not object to the admission of the crime scene video and failed to object to its presentation to the jury until after the district court had already issued its ruling. This video was cumulative of photographs later introduced. It showed a lot of blood evidence but not in any great detail so as to be probative and/or exculpatory. For instance, it did not clearly show the bloody footprint on the victim's back. It was gruesome and likely inflamed the jury's passion for the victim. Had Olson properly lodged an objection, the district court likely would have disallowed the evidence.

Additionally, Main's counsel failed to make an offer of proof regarding the Little Valley Locals gang evidence. Where an objection to evidence is sustained, and the answer of the witness is not apparent, an offer of proof is necessary to enable this Court to review the ruling. The purpose of an offer of proof is to advise this Court as to the nature of the evidence intended to be elicited by the challenged question in order to enable the court to determine whether or not the ruling made was correct. *State v. Jennings*, 96 Mont. 80, 88, 28 P.2d 448 (1934). In *State v. Raugust*, 2000 MT 146, ¶¶ 27-28, 300 Mont. 54, 3 P.3d 115, this Court made it

very clear the failure to make an adequate offer of proof results in a waiver of the issue on appeal.

Olson knew or should have known that his failure to make an offer of proof as to the relevance of the Little Valley Locals gang was necessary in order to preserve the evidentiary issue for appeal. As such an offer was not made on the record, this Court cannot review the issue. There can be no strategic reason in failing to make such an offer. Competent counsel would have taken steps to preserve their client's right of appeal. Prejudice is established, when due to his trial counsel's failure to take the proper steps, Main no longer has the right to have this Court review this error. An error which likely would have established a motive for Norquay and Missy.

Last, perhaps the most egregious error occurred when Main's trial counsel failed to object to Kemp's testimony regarding his speculative theory that a combination of alcohol and blunt force trauma resulted in Kvelstad's death. As argued previously, Kemp's testimony in this regard did not meet the minimum standard of reliability required for its presentation to the jury. While there can be no strategic reason in allowing such evidence at trial, Main urges this Court to review this error pursuant to the plain error doctrine if it is disinclined to review it as an ineffective assistance of counsel claim on direct appeal. *State v. Thorp*, 2010 MT 92, ¶ 23, 356 Mont. 150, __ P.3d __ (plain error review applies to errors which

implicate a defendant's fundamental constitutional rights and may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process).

Kemp's conjecture and Main's trial counsel's failure to object to the testimony and have it excluded from the jury plainly prejudiced Main's fair trial rights. This error impermissibly permitted the jury to infer Main's actions in allegedly causing blunt force trauma injuries to the victim were causally related to his death. This likely inference is best evidenced by the district court's statement when it denied Main's motion to dismiss for insufficient evidence that it believed the trier of fact should determine whether blunt force trauma caused Kvelstad's death. (Tr. at 1237.) Simply put, there was no admissible evidence connecting the blunt force trauma injuries to Kvelstad's death save for Kemp's improper speculation. Had the jury never heard this evidence, Main, in all likelihood, would not have been convicted of felony murder.

Based on the foregoing analysis, Olson should have objected to Kemp's expert testimony and to the admission and playing of the crime scene video. Further, Olson should have made an offer of proof with respect to Little Valley Locals gang evidence which provided a motive for Norquay and/or Missy's involvement in Kvelstad's murder. His failure to do these things constituted deficient performance and fell short of the range reasonably demanded in light of

the Sixth Amendment. Furthermore, these failures prejudiced Main's right to a fair trial as there is a reasonable probability the result of the proceeding would have been different had his counsel not committed these errors.

CONCLUSION

Based on the arguments advanced above, various reversible errors occurred at the trial level. First, the district court erred when it failed to grant Main's motion to dismiss for lack of sufficient evidence. It also erred when it denied Main's motion to suppress evidence. Last, Main was denied effective assistance of counsel. All of these errors prejudiced Main and require reversal of his conviction.

Respectfully submitted this ___th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

ROBIN A. MEGUIRE

APPENDIX